FILED
NOV 6 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1941

No. 289

KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING, on behalf of themselves and all other owners and holders of bonds of Martin Drain and Branches Drain District of Macomb County, Michigan,
Petitioners,
vs.
MARTIN DRAIN AND BRANCHES DRAIN DISTRICT, a public quasi corporation of Macomb County, Michigan, et al.,
Respondents

PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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PETITION FOR REHEARING ON APPLICATION FOR WRIT OF CERTIORARI

The above petitioners hereby respectfully petition the Court to grant a rehearing on the petition for certiorari heretofore denied October 13, 1941, for the following reasons:

1. The decision of the Court of Appeals, Sixth Circuit, entitled *Bloomfield Village Drain District, et al., v. Keefe, et al.*, 119 F. (2) 157, conflicts with local law in the particu-

lars set forth in paragraph 2 of the reasons relied upon for allowance of writ in the petition for certiorari.

2. The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, which decision will be conclusive as to the applicable principles of law governing this case, and this Court should await such decision.

This motion is based upon the records and files herein and accompanying brief.

Counsel for petitioners hereby certify that this petition is presented in good faith and not for delay.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

BRIEF IN SUPPORT OF PETITION FOR REHEARING

The accompanying motion is confined to those points which have to do with local law and on which federal courts cannot exercise an independent judgment. The petition for certiorari in paragraph 2 of the reasons relied upon for allowance of the writ sets forth the particulars on which petitioners believe that the Court of Appeals came to a conclusion opposed to local law. Briefly these points of conflict are: (a) holding the improvement is illegal under Michigan law, (b) holding that the bond recitals do not protect *bona fide* holders of the bonds against the claims of illegal action by the drain district and drain commissioner, (c) holding that estoppel of the drain district to plead illegality does not establish the duty of officers and others to provide funds for bond payments, (d) ignoring the point that under the drain law and interpretations in effect when the bonds were issued collateral attack was barred, and (e) ignoring the point that money collected and on hand for distribution to bondholders should be distributed irrespective of the validity or non-validity of the bonds.

By prior proceedings herein, and particularly by petitioners' motion to enlarge the time for filing a petition for rehearing, this court was advised that a case will soon be decided by the Supreme Court of Michigan in which points a, b, c and d are involved. We refer to *City of Highland Park, et al. v. Clark, et al.*, which has now been orally argued, and in which briefs have been filed. The opinion of the Michigan Supreme Court can now be expected within a few days or weeks.

While no one, except the Michigan Court, knows what the decision in the City of Highland Park case will be, we believe it must definitely declare the law of Michigan as to the kind of a drainage improvement the drain commissioner was authorized under the Michigan Drain Law to build, and even if it is decided that the drainage improvement there involved, which is similar to those involved in this and companion cases, was an illegal sewer rather than a drain, it must still decide whether the bonds are enforceable on the principle of estoppel.

The Court of Appeals' decision is based upon its conception of Michigan law. It in effect assumes that the Michigan court of last resort would be required to decide the case as it decided it. Within a very short time we will know whether this assumption is correct. Respondents in this case must recognize that the forthcoming opinion of the Michigan Court must either confirm what the Court of Appeals has decided, or flatly contradict it, for they have filed briefs *amici curiae* urging that the Court of Appeals' opinion ought to be followed.

The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae*, it will end this case. As no money or property is withheld from respondents they will have suffered no loss as a result of the brief period of time during which the matter remains undecided. On the other hand, holders of these bonds will suffer great and irreparable loss if the Michigan Court should flatly disagree with the Court of Appeals and hold that it has wrongly construed local law, and the decree of the latter court stands without an opportunity to review. It will then mean that bondholders' rights have been judged by a conception of law proven to be erroneous.

DAVID M. WOOD,
RAYMOND K. DYKEMA,
Counsel for Petitioners.

FEB 23 1942
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Respondents

RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

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RESPONDENTS' SUPPLEMENTAL BRIEF IN OPPOSITION TO PETITION FOR REHEARING AFTER DENIAL OF PETITION FOR WRIT OF CERTIORARI.

This Honorable Court, in passing upon the pending petition for rehearing, may now grant the request of counsel for petitioners and give consideration to the case of the *City of Highland Park, et al., v. Earl L. Clark, Drain Commissioner of Oakland County, et al.* The Michigan Supreme Court decided the Highland Park case on February 11th, 1942, and a copy of the State Court's decision is attached hereto as Exhibit "A." This recent

case is referred to in the brief in support of the petition for rehearing as follows:

> "While no one, except the Michigan Court, knows what the decision in the City of Highland Park case will be, we believe it must definitely declare the law of Michigan as to the kind of a drainage improvement the drain commissioner was authorized under the Michigan Drain Law to build, and even if it is decided that the drainage improvement there involved, which is similar to those involved in this and companion cases, was an illegal sewer rather than a drain, it must still decide whether the bonds are enforceable on the principle of estoppel."
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> * * *
>
> "The granting of a rehearing can visit no harm upon respondents, for if the Michigan Court decides as they urge it to do in their briefs *amici curiae, IT WILL END THIS CASE.*" (Emphasis supplied.)

In opposing counsel's reasons for a rehearing they set forth:

> "The Supreme Court of Michigan will, within a short time, decide a case which presents identical questions of law, which decision *WILL BE CONCLUSIVE* as to the applicable principles of law governing this case, and this Court should await such decision." (Emphasis supplied.)

The history of the Highland Park state case disclosing how a suit pending in the Federal Court with all pleadings filed and issues involved similar to the drain cases upon which this Court denied certiorari was dismissed and the Highland Park case started in the State court appears in our brief on file in the companion Nine Mile Drain case, this Court Docket No. 291, one of the five related cases (this Court Docket Nos. 287-291). It now appears that peti-

tioners' attempts to convince the Supreme Court of the State that it should repudiate the State Court holdings upon which the United States Circuit Court of Appeals grounded its decision in the drain cases have failed. The State Court, in the Highland Park case, adhered to its well established precedents followed by the Circuit Court of Appeals and in addition thereto cited with approval the case at bar and all the companion drain cases now before this Court on petition for rehearing after certiorari has been denied. This is all summed up in the last two sentences of the State Court's opinion as follows:

> "*We repeat* that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. *Kennedy v. Dingman*, 272 Mich. 24. The Federal courts likewise recognize the Michigan rule, *here repeated*, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. *Bloomfield Village Drain District v. Keefe*, and four other cases,* (U. S. Circuit Court of Appeals (6th Circuit), March 14, 1941), 119 Fed. (2d) 157." (Emphasis supplied.)

It now clearly appears that the only substance to the petition for rehearing was a request by petitioners to withhold passing upon the petition for rehearing while petitioners' counsel attempted to have the State Court change the law of the state.

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*This reference is to the *Keefe v. Bloomfield Village Drain District*, *Keefe v. Nine Mile Drain District*, *Keefe v. Martin Drain District*, and *Keefe v. Center Line Drain District*, the same cases upon which certiorari has been denied and now before this Honorable Court on petition for rehearing.

The Highland Park case confirms our contention that there is no merit to the petition for rehearing. We respectfully submit that the petition for rehearing should be denied.

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Detroit, Michigan,

BERT V. NUNNELEY,
Mount Clemens, Michigan,
Counsel for Respondents.

EXHIBIT A

CITY OF HIGHLAND PARK, a municipal corporation, NATHAN SIMONS and SEYMOUR SIMONS, Testamentary Trustees of the Estate of D. W. Simons, Deceased, KENNETH M. KEEFE, ERNEST E. QUANTRELL and PELHAM C. WILMERDING,
Relators,

v.

EARL L. CLARK, Drain Commissioner of Oakland County, and BOARD OF SUPERVISORS OF OAKLAND COUNTY,
Respondents.

No. 41,609.

Before the entire bench.

BUSHNELL, J. Relators, who claim to be bona fide holders for value of bonds issued by Royal Oak No. 7 Storm Sewer Drain District in the Township of Royal Oak, Oakland County, Michigan, seek a writ of mandamus directing and commanding respondents, the drain commissioner of Oakland county and the board of supervisors of that county, to severally and collectively perform such acts as will result in the levy, certification and spread of all unpaid portions of the installments of taxes levied for this drain, and such supplemental or deficiency assessment as shall be sufficient to pay all outstanding bonds of the district. We issued an order to show cause and it was stipulated between the parties that the answer of the drain commissioner and the board of supervisors should stand as the return to that order.

The proceedings to establish this drainage district were instituted on June 3, 1927, under Act No. 316, Pub. Acts 1923, (1 Comp. Laws 1929, Sec. 4836 et seq. [Stat. Ann. Sec. 11.1 et seq.]) which only authorize the construction of drains. This act has been since amended (Act No. 318, Pub. Acts 1929, and others) and now includes provisions for the building of sewers and sewage facilities in connection with drains. The proceedings progressed in the usual manner and bonds in the par amount of $191,000 were issued. The entire issue was purchased by a brokerage house in the City of Detroit and payment therefor was made to the county treasurer. The bonds were resold to various investors and these relators now hold 150 bonds of the outstanding issue.

The construction was of an underground type, of vitrified, double strength sewer crock, with catch basins for surface waters and Ys for sanitary sewer connections to each residential lot, capable of caring for sanitary sewage and surface waters of the whole area of the district. The underground conduits range from 12 to 54 inches in diameter.

The bonds have been in default since May 1, 1931, due to the suspension of the levy of installments of the assessment for this project during the years 1932 to 1936, inclusive. All bonds are now past due and interest has been in default since May 1, 1940. On December 12, 1940, relators entered into written agreement with the drain commissioner, board of auditors, and treasurer of the county, whereby 30 per cent of the accrued interest was cancelled and refunding bonds were to be issued. Relators surrendered their interest coupons, consented to an indorsement on their bonds of a receipt for all interest to May 1, 1940, and were paid 70 per cent of the accrued interest. Respondent drain commissioner then

sought authority for the issuance of refunding bonds and, on February 13, 1941, the Michigan Public Debt Commission signed an order authorizing such an issue. Relators were later informed by respondents that they would neither issue such refunding bonds nor levy any further taxes for the payment of existing bonds. The answer of respondents avers in substance that the refunding agreement, having been executed without the authority or approval of the board of supervisors, is void and of no force and effect, and that, because of the holding of this court in Village of Oak Park v. Van Wagoner, 271 Mich. 450, decided May 17, 1935, the bonds held by relators are void.

In the 12 briefs that have been filed in this cause by the parties and various amici curiae, to whom leave was granted, it is conceded that decision in this case affects not only the possibility of payment of the defaulted bonds of this issue, but many millions of other outstanding drain bonds.

The issues presented may be summarized as follows:

1. Is the decision in Village of Oak Park v. Van Wagoner, 271 Mich. 450, either res adjudicata or stare decisis?

2. Are respondents estopped by the recitals in the bonds?

3. May the validity of the drainage proceedings be attacked in a collateral suit?

4. Is Royal Oak No. 7 Storm Sewer Drain a sewer or a drain?

5. Is mandamus the appropriate remedy?

Litigation regarding the validity of drainage projects has been determined by this court in various cases, among

which are the following: Clinton v. Spencer, 250 Mich. 135; Warren v. Township of Engelbrecht, 251 Mich. 608; Kinner v. Spencer, 257 Mich. 142; Township of Lake v. Millar, 257 Mich. 135; Hankinson v. Deake, 265 Mich. 1; Village of Clawson v. Van Wagoner, 268 Mich. 148; Village of Oak Park v. Van Wagoner, 271 Mich. 450; Kennedy v. Dingman, 272 Mich. 24; Meyering Land Co. v. Spencer, 273 Mich. 703; Detroit Fire & Marine Ins. Co. v. Oakland County, 284 Mich. 130; Detroit Trust Co. v. Dingman, 291 Mich 170.

In none of the above cases were bondholders actual parties, although respondents argue that bondholders were represented by the drain commissioner. Holders of bonds issued on projects covered by some of the foregoing cases have litigated their claims in the Federal courts. The most recent Federal decision is Bloomfield Drain District v. Keefe, 119 Fed. (2d) 157. Other Federal cases are an unreported one before Judge Raymond in the Western District of Michigan and Royal Oak Drain District v. Keefe, 87 Fed. (2d) 786.

No useful purpose would be served in reviewing the cited cases, each of which has been re-examined as to its applicability to the issues presented. Careful consideration requires the conclusion that decision in the instant case is governed by the reasoning in Village of Oak Park v. Van Wagoner, 271 Mich. 450. Although five members of the court concurred specially in the opinion in that case, nevertheless the court was unanimous in holding that the Royal Oak No. 7 project was a sewer and not a drain; that the defendant drain commissioner was wholly without jurisdiction in the premises, and that therefore the entire proceedings were void and subject to collateral attack. In arriving at this conclusion, the court unanimously concurred in the statement that, "The acts of the

drain commissioner were without warrant in law, and any tax levied and collected as a result thereof would constitute the taking of property without due process of law." We held unanimously that all assessments levied against the village should be cancelled and set aside and permanently restrained the drain commissioner from collecting, or attempting to collect, the same or any portion thereof.

The project was designated "Royal Oak No. 7 Storm *Sewer* Drain," and the bonds bore the heading, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." It was recited in the bonds "that all acts, conditions and things required to be done, precedent to and in the issuance of this bond in order to make it a binding obligation of the Royal Oak No. 7 Storm *Sewer* Drain District have been done * * * and for the prompt payment hereof * * * the full faith, credit and resources of said Drain District are hereby irrevocably pledged." The underground conduits are all of the same size and character as when they were laid and are serving the same purpose for which they were laid. If the levy of a tax in 1935 "would constitute the taking of property without due process of law," the levying of a tax now would also constitute the taking of property without due process of law.

We do not say that the Village of Oak Park case, supra, is res adjudicata of the rights of these relator bondholders nor do we hold that they had their day in court, through representation by the drain commissioner who was the defendant in that action. We do say, however, that the rule of stare decisis should be applied even though equitable considerations might prompt a different result. Detroit Trust Co. v. Detroit City Service Co., 262 Mich. 14, 35. See, also People v. Droste, 160 Mich. 66, 75, and Colborne v. Detroit United Railway,

177 Mich. 139, 142. Since we held in 1935 that it was illegal to levy and collect any tax assessed as a result of this project, under the doctrine of stare decisis we must hold now that it is illegal to levy and collect a tax to pay outstanding bonds issued incident to the same project.

It is urged that respondents are estopped by the recitals in the bonds to deny their validity. Generally speaking, a municipal corporation cannot be estopped by the unauthorized and illegal acts of its officers. Certainly the board of supervisors of Oakland county cannot be estopped by the drain commissioner of that county because he had no legal authority whatever to speak for them and the counter signature of the county clerk was merely a ministerial act.

Is the drain district estopped by the recitals of the drain commissioner? Among the authorities cited in support of relators' contention, the case of Thompson v. Village of Mecosta, 127 Mich. 522, is typical. In that case the Village of Mecosta had authority to issue public improvements bonds and, so far as the bonds issued were concerned, they were perfectly good on their face. There was nothing to challenge the attention of the purchaser, such as the title of the proceedings and the heading of the bonds in the instant case. They were designated only as public improvement bonds of the Village. The bonds were, however, "delivered to the Hutchinson Manufacturing Company of Jackson, Mich., as a bonus or aid to parties erecting a gristmill," a purpose for which the village wholly lacked authority to issue bonds, namely, a private improvement. The bonds upon their face "unquestionably carried a false pretense." This court held that—

> "a bona fide purchaser for value had a right to rely upon the statement of the board, appearing in the bond, that it was issued to borrow money under this act, for lawful purposes; i. e., public improvements." Citing authorities.

Judgment, however, for plaintiff was reversed and one entered for the Village because of the absence of proof of bona fides.

In the instant case there is no showing, and can be no showing, of false pretense. Each obligation now in question bore title, "Royal Oak No. 7 Storm *Sewer* Drain District Bond." The drain commissioner had no authority to build a *sewer* drain. He was wholly without jurisdiction and his void acts cannot estop the drain district, even though it can be argued that the taxpayers of the drain district have profited by his unauthorized acts.

Since relators do not present a case warranting the relief asked for, we need not pass upon the propriety of mandamus as a remedy in this action.

The writ of mandamus is denied. A public question being involved, no costs will be allowed.

Boyles, J. I concur on the ground that no facts are adduced in this case outside of those before us in Village of Oak Park v. Van Wagoner, 271 Mich. 450. This record shows that every step in the proceeding resulting in the issuance of these bonds, from the original application for laying out the drainage district to issuing the bonds thereon, refers to a *Storm Sewer Drain.* At the oral argument and in numerous briefs filed by amici curiae, it is urged that the validity of at least eleven other bond issues involving several millions of dollars depends upon the decision in this case. The validity of such issues depends upon the facts and circumstances under which

they were issued. See Royal Oak Drain District, Oakland County, Mich. v. Keefe (U. S. Circuit Court of Appeals [6th Circuit], January 14, 1937), 87 Fed. (2d) 786. We repeat that the controlling legal distinction between sewers and drains is the primary purpose of the structure which determines its character regardless of what may be purely incidental purposes. Kennedy v. Dingman, 272 Mich. 24. The Federal courts likewise recognize the Michigan rule, here repeated, that the drain district or municipality is not estopped from denying validity of a bond issue on the ground of total lack of jurisdiction. Bloomfield Village Drain District v. Keefe, and four other cases, (U. S. Circuit Court of Appeals [6th Circuit], March 14, 1941), 119 Fed. (2d) 157.

Chandler, CJ., and North, Starr, Wiest, Butzel, and Sharpe, JJ., concurred with Boyles, J.

Bushnell, J. I agree with the amplification as stated by Mr. Justice Boyles.